China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-747 OF 1993 CONSOLIDATED WITH CIVIL APPEAL NO 02-5 OF 1994
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
24 MAY 1996

Civil Procedure *— Appeal — Principles on which appellate court can interfere with findings of fact of the court below — Distinction between finding of specific fact which depends upon credibility of witnesses and finding of fact which depends upon inferences drawn from other facts — Whether appellate court will more readily interfere with trial judge's finding of facts in the case of the former*

Contract *— Termination — Validity — Debtor unable to pay debt despite indulgence given creditor and consequential notice of demand from creditor's solicitors — Creditor terminated agreement on grounds that debtor was 'insolvent' pursuant to clause in agreement — Meaning of 'insolvent' — Whether any legal definition — Whether termination of contract valid*

Contract *— Performance bond — Distinction between conditional and unconditional 'on demand' guarantee — Sum payable if principal breach agreement — Whether guarantee conditional or unconditional — Whether bank should make enquiry before paying out money under guarantee*

Words and Phrases *— 'Insolvent'*

The respondent ('Maltran') sold airline tickets for the appellant ('China Airlines') in Malaysia since 1 January 1982. In mid-1982, pursuant to a general sales agent agreement ('the GSA agreement'), China Airlines appointed Maltran as its general sales agent ('GSA') for the northern states of West Malaysia. The GSA was extended to Johor Bahru in October 1982, and to Kuala Lumpur in September 1983. The GSA agreement was renewed on a year to year basis. However, on 4 July 1986, Maltran was notified by letter that China Airlines would not renew its appointment as GSA for Kuala Lumpur after September 1986. Following the non-renewal, Maltran was instead appointed merely as the passenger sales agent ('PSA') under an agreement. Meanwhile, under the GSA agreement, Maltran had accepted unconditional responsibility for the payment of all sums due to China Airlines by providing a bank guarantee ('the bank guarantee') issued by Perwira Habib Bank Bhd ('the bank') to pay on demand to China Airlines the sum of RM400,000 'for the due performance of the covenants' under the GSA agreement, and that sum should become payable in the event of Maltran's 'failure to perform the said covenant'. Subsequently, as a result of Maltran's

failure to settle the accumulated amount for tickets purchased from China Airlines amounting to RM824,171.14, China Airlines terminated the GSA agreement pursuant to art XV(3) of the agreement. China Airlines then wrote to the bank to enforce the bank guarantee, and the bank paid out RM400,000. In an action in the High Court, Maltran claimed that: (i) China Airlines owed them a sum of RM1,679,097.49 which was the bonus granted to them under an incentive bonus scheme for the years 1986, 1987, 1988 and 1989; (ii) China Airlines had wrongfully terminated the agreement because according to art XV(3) of the GSA agreement, the agreement could only be terminated if Maltran was in the state of insolvency; and (iii) the bank had paid the sum under the bank guarantee without making enquiry as to whether Maltran had failed to perform the covenants under the GSA agreement. China Airlines in turn argued that Maltran was not entitled to be paid the incentive bonus for the year 1986 in the absence of a written agreement in respect of the bonus for that year. It was further argued that the bonus scheme only applied to sales of tickets as a PSA and not GSA. High Court went on to hold that Maltran was entitled to the bonus sum of RM1,679,097.49 although the parties had agreed to reserve examination on Maltran's loss of income after the question of liability was decided. Against this part of the decision, China Airlines appealed ('the first appeal'). As against the High Court's decision that the GSA agreement was lawfully terminated following Maltran's failure to settle the sum pertaining to the tickets, and that Maltran had no claim against the bank, Maltran appealed ('the second appeal').

Held, allowing the first but dismissing the second appeal:

(1) The trial judge was wrong to make the assessment of loss of income without hearing the parties, especially when the argument on quantum, as opposed to liability, was postponed until after the conclusion of the taking of evidence on liability (see p 526A–B).

(2) It is a settled principle of law that in an appeal where facts have to be reviewed, it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (see p 527E); *Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor* [1942] 1 All ER 142 and *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 followed.

(3) However, a distinction can be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily

A interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former (see pp 527I and 528A–B); *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 and *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 followed.

B (4) As the trial judge did not make any specific finding of fact based on the evidence of witnesses and the documents and there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them, the appellate court is in as good a position to review and evaluate the evidence of the case as the trial judge C (see p 528G–I).

(5) As there was no written agreement for the granting of bonus for 1986, the proper inference to be drawn was that there was no agreement to pay the agent the 1986 bonus when the agreements for the following three years were in writing (see p 529H).

D (6) The inescapable inference which could be drawn from the contemporaneous documents and the conduct of the parties was that there was no question of the agent being entitled to the incentive bonus as a PSA and not a GSA (see p 531G).

(7) The word 'insolvent' as used in the agreement cannot have any E technical meaning ascribed to it because it has no such meaning in our Bankruptcy Act 1967, where only the word 'bankrupt' is used. By popular usage, 'insolvent' means unable to pay debts or to discharge one's liabilities. As Maltran was unable to pay its outstanding debt despite the indulgence given by China Airlines and the consequential notice of demand from the solicitors, the F agent must be deemed to be insolvent. Hence, the GSA agreement was lawfully terminated (see pp 532H–I and 533A).

(8) A bank guarantee is a performance bond of which there are two types. The first is a conditional bond whereby the guarantor becomes liable upon proof of a breach of the terms of the G principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The second is an unconditional or 'on demand' bond where the guarantor will become liable when demand is made upon him by the H beneficiary with no necessity to prove any default in performance of the principal contract (see p 534B–D).

(9) The judge was correct in holding that the payment out of the sum of RM400,000 under the bank guarantee was lawfully made as the solicitors' letter of demand to the bank had given the reason that Maltran had failed to perform its part of the covenants I under the GSA agreement (see p 536G–I).

[Bahasa Malaysia summary

Penentang ('Maltran') menjual tiket penerbangan bagi pihak perayu ('China Airlines') di Malaysia sejak 1 Januari 1982. Dalam pertengahan tahun 1982, menurut suatu perjanjian ejen jualan am ('perjanjian EJA'), China Airlines telah melantik Maltran sebagai ejen jualan am ('EJA') untuk negeri-negeri utara Malaysia Barat. EJA telah diperluaskan ke Johor Bahru dalam bulan Oktober 1982, dan ke Kuala Lumpur dalam bulan September 1983. Perjanjian EJA diperbaharui dari setahun ke setahun. Namun demikian, pada 4 Julai 1986, Maltran telah diberitahu melalui surat bahawa China Airlines tidak akan membaharui lantikannya sebagai EJA bagi Kuala Lumpur selepas bulan September 1986. Sebagai gantinya, Maltran hanya dilantik sebagai ejen jualan penumpang ('EJP') di bawah suatu perjanjian. Sementara itu, di bawah perjanjian EJA, Maltran telah menerima tanggungjawab tanpa syarat ke atas bayaran semua jumlah yang terhutang kepada China Airlines dengan memperuntukkan suatu gerenti bank ('gerenti bank') yang dikeluarkan oleh Perwira Habib Bank Bhd ('bank tersebut') untuk membayar kepada China Airlines atas tuntutan jumlah sebanyak RM400,000 'untuk pelaksanaan waad' di bawah perjanjian EJA, dan jumlah itu mesti dibayar jikalau Maltran 'gagal melaksana waad tersebut'. Ekoran itu, akibat kegagalan Maltran untuk menyelesaikan jumlah amaun tiket yang dibeli daripada China Airlines sebanyak RM824,171.14 China Airlines telah menamatkan perjanjian EJA mengikut perkara XV(3) perjanjian itu. China Airlines kemudiannya menulis kepada bank tersebut untuk menguatkuasa gerenti bank, dan bank tersebut telah membayar RM400,000. Dalam satu tindakan di Mahkamah Tinggi, Maltran menuntut bahawa: (i) China Airlines berhutang kepada mereka jumlah sebanyak RM1,679,097.49 yang merupakan bonus yang harus diberikan kepada mereka di bawah suatu skim bonus galakan bagi tahun-tahun 1986, 1987, 1988 dan 1989; (ii) China Airlines telah menamatkan perjanjian itu secara tidak sah kerana menurut perkara XV(3) perjanjian EJA, perjanjian itu hanya boleh ditamatkan jika Maltran berada dalam kedudukan tak solven; dan (iii) bank tersebut telah membayar jumlah itu di bawah gerenti bank tanpa membuat pertanyaan sama ada Maltran telah gagal melaksana waad di bawah perjanjian EJA atau tidak. China Airlines pula berhujah bahawa Maltran tidak patut dibayar bonus galakan bagi tahun 1986 dalam ketiadaan perjanjian bertulis berkaitan bonus untuk tahun itu. Ia selanjutnya berhujah bahawa skim bonus hanya terpakai kepada jualan tiket sebagai EJP dan bukan EJA. Mahkamah Tinggi telah membuat keputusan bahawa Maltran berhak kepada jumlah bonus sebanyak RM1,679,097.49 meskipun pihak-pihak yang berkenaan telah bersetuju untuk menunda pemeriksaan atas kehilangan pendapatan Maltran sehingga soalan liabiliti telah diputuskan. China Airlines merayu terhadap bahagian keputusan ini ('rayuan pertama'). Berkenaan dengan keputusan

A Mahkamah Tinggi bahawa perjanjian EJA telah ditamatkan secara sah akibat kegagalan Maltran untuk menyelesaikan jumlah berkenaan dengan tiket, dan bahawa Maltran tidak mempunyai tuntutan teradap bank, Maltran telah membuat rayuan ('rayuan kedua').

B **Diputuskan,** membenarkan rayuan pertama tetapi menolak rayuan kedua:

(1) Hakim perbicaraan adalah salah dalam membuat taksiran kehilangan pendapatan tanpa mendengar pihak-pihak, terutamanya apabila hujah berkenaan kuantum, yang berbeza dengan liabiliti, telah ditunda sehingga selepas penyelesaian C pengambilan keterangan atas liabiliti (lihat ms 526A–B).

(2) Adalah merupakan rukun undang-undang mantap bahawa dalam suatu rayuan di mana fakta harus dikaji semula, adalah tidak elok untuk berbuat demikian di mana kesimpulan yang dibuat adalah amat bergantung kepada kebolehpercayaan saksi dan tanggapan D mahkamah yang telah melihat mereka dan boleh menilai kejujuran dan ketepatan mereka (lihat ms 527E); *Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor* [1942] 1 All ER 142 dan *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 diikut.

(3) Walau bagaimanapun, perbezaan boleh dibuat antara pendapat E fakta khas yang bergantung kepada kebolehpercayaaan saksi dan pendapat fakta yang bergantung kepada inferens yang dibuat daripada fakta lain. Dalam kes kedua, sesebuah mahkamah rayuan akan lebih sedia campur tangan dengan pendapat fakta hakim perbicaraan dan membentuk suatu pendapat yang bebas, berbanding dengan kes pertama (lihat ms 527I dan 528A–B); F *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 dan *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 diikut.

(4) Oleh kerana hakim tidak membuat sebarang pendapat fakta yang khas berdasarkan keterangan saksi dan dokumen dan tiada apa-apa dalam penghakiman beliau yang menandakan keputusan G beliau adalah berdasarkan kebolehpercayaan saksi atau akibat tanggapan yang dibuat oleh beliau, mahkamah rayuan berada dalam kedudukan baik untuk mengkaji semula dan menilai bukti kes itu sama seperti hakim perbicaraan (lihat ms 528G–I).

(5) Oleh kerana tidak terdapat perjanjian bertulis untuk pemberian H bonus bagi tahun 1986, inferens yang wajar dibuat ialah bahawa tidak terdapat perjanjian untuk membayar bonus bagi tahun 1986 kepada ejen apabila perjanjian untuk tiga tahun berikut adalah dalam bentuk bertulis (lihat ms 529H).

(6) Inferens tidak boleh dielak yang boleh dibuat daripada dokumen semasa dan kelakuan pihak ialah bahawa tidak terdapat apa-apa I ragauan bahawa ejen adalah berhak kepada bonus galakan sebagai EJP, dan bukan sebagai EJA (lihat ms 531G).

(7) Perkataaan 'tak solven' seperti yang digunakan dalam perjanjian itu tidak boleh mempunyai apa-apa maksud teknikal yang dikepilkan kepadanya sebab ia tidak mempunyai makna sedemikian dalam Akta Kebankrapan 1967 kita, di mana hanya perkataan 'bankrap' digunakan. Menerusi kegunaan popular, 'tak solven' bermakna tidak mampu membayar hutang atau melepaskan liabiliti seseorang. Memandangkan Maltran tidak mampu membayar hutang yang belum dijelaskan walaupun peluang telah diberikan oleh China Airlines disusuli oleh notis tuntutan daripada peguamcaranya, Maltran mestilah dianggap sebagai tak solven. Justeru itu, perjanjian EJA telah ditamatkan secara sah (lihat ms 532H–I dan 533A).

(8) Sesuatu gerenti bank adalah bon pelaksanaan yang terbahagi kepada dua jenis. Jenis yang pertama ialah bon bersyarat di mana penggerenti bertanggungjawab apabila terdapat bukti kemungkiran terma kontrak utama oleh prinsipal dan benefisiari mengalami kerugian akibat kemungkiran itu. Dengan demikian, liabiliti penggerenti akan timbul akibat kemungkiran prinsipal. Yang kedua adalah bon tanpa syarat atau 'atas tuntutan' di mana penggerenti akan bertanggungjawab apabila tuntutan dibuat ke atasnya oleh benefisiari tanpa keperluan untuk membukti sebarang keingkaran dalam pelaksanaan kontrak utama (lihat ms 534B–D).

(9) Hakim adalah betul dalam membuat keputusan bahawa bayaran daripada jumlah RM400,000 di bawah gerenti bank telah dibuat secara sah oleh kerana surat tuntutan peguamcara yang ditujui kepada bank tersebut telah memberi sebab bahawa Maltran gagal melaksana sebahagian daripada waadnya di bawah perjanjian EJA (lihat ms 536G–I).]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on termination, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2191–2195.

For cases on performance bond, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1961–1967.

Cases referred to

Benmax v Austin Motor Co Ltd [1955] 1 All ER 326

Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor [1942] 1 All ER 142

Esal (Commodities) Ltd & Anor v Oriental Credit Ltd & Anor [1985] Lloyd's Rep 546

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149

IE Contractors Ltd v Lloyd's Bank plc and Rafidian Bank [1990] 2 Lloyd's Rep 296

A *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87
Watt (or Thomas) v Thomas [1947] 1 All ER 582

Legislation referred to

Companies Act 1965 Pt XI

B

Appeal from: Civil Suit Nos D2–22–2012–1989 and D!–22–2049–1989 (High Court, Kuala Lumpur)

Manjit Singh (*Ngeow Yin Ngee* with him) (*Ngeow & Maurice Gomez*) for the appellant.

C *N Chandran* (*Ranjit Singh* with him) (*Adnan Sundra & Low*) for the respondent.

Civil Appeal No 02–5–94

N Chandran (*Ranjit Singh* with him) (*Adnan Sundra & Low*) for the

D appellant.

Manjit Singh (*Ngeow Yin Ngee* with him) (*Ngeow & Maurice Gomez*) for the first respondent.

S Nantha Balan (*Shook Lin & Bok*) for the second respondent.

Mohamed Dzaiddin FCJ (delivering the grounds of judgment of the court):

E These two appeals arose from the decision of the High Court (Commercial Division) Kuala Lumpur in two consolidated actions given on 7 December 1993. In Civil Appeal No 02–747–1993, China Airlines Ltd ('China Airlines') was dissatisfied with part of the decision of the learned judge who ordered China Airlines to pay to the first respondent, Maltran Air Corp Sdn Bhd ('the

F agent'), a sum of RM1,679,097.49 with interest at the rate of 8% per annum from 11 September 1989 to the date of full payment. The judge held that this amount represented the sum due and owing by China Airlines to the agent under the airline's incentive bonus scheme for the years 1986, 1987, 1988 and 1989.

G The second appeal, Civil Appeal No 02–5–1994, was brought by the agent who was dissatisfied with the decision of the trial judge in dismissing its other claim against China Airlines, in particular against the order of the court that it was liable to pay to China Airlines the sum of RM814,171.14 with interest. The agent was also dissatisfied with the order dismissing its claim against Perwira Habib Bank Bhd ('the bank'), the second respondent,

H with respect to the banker's guarantee given by the bank to China Airlines, undated but valid from 10 August 1989 to 9 August 1990. We propose to deal with these appeals separately.

Factual background

I China Airlines is a foreign incorporated company registered in Malaysia as a foreign company under Pt XI of the Companies Act 1965, whose main object is to carry on air transport business of China Airlines Ltd

(incorporated in Taipeh, Republic of China) in Malaysia. The agent is a locally incorporated company having its registered office at 410, Kompleks Antarabangsa, Kuala Lumpur and has since 1 January 1982 sold airline tickets for China Airlines in Malaysia. It seemed that for the first half of 1982, the agent brought in US$350,000 worth of business. In return for the good performance by the agent, China Airlines appointed the agent as its general sales agent ('GSA') for the northern states of West Malaysia, namely, Penang, Kedah, Perlis, Perak, Kelantan, Trengganu and Pahang. On 21 June 1982, the GSA agreement, AB2–15, was executed between the parties in Taipeh. Loh Cheng Hoe ('PW1') — the managing director of the agent — signed for the agent, while one Eugene Chen, the airline's sales and marketing director, signed for China Airlines. Later, in October 1982, the GSA was extended to Johor Bahru. Due to the increased volume of airline business in Kuala Lumpur, China Airlines agreed to appoint the agent as its GSA for Kuala Lumpur with effect from 1 September 1983. An agreement, AB19, was then executed. As AB19 was expressed to be on a year to year basis, upon its expiry on 31 August 1984, the agent's appointment as GSA for Kuala Lumpur was further renewed for 1984 and 1985. The agreement for 1985 would expire on 31 August 1986. However, on 4 July 1986, the agent was notified by letter that China Airlines would not renew its appointment as GSA for Kuala Lumpur after 1 September 1986 although this notice did not affect other areas. Following the non-renewal of the GSA agreement for Kuala Lumpur, the agent was instead appointed merely as the passenger sales agent ('PSA'). An agreement dated 1 September 1986, AH2–4, was duly executed in Taipeh. It is to be noted that although the agreement did not provide the area of operation, the agent had maintained that the PSA was for Kuala Lumpur only.

Meanwhile, under art VII(1) of the GSA agreement, the agent accepted, inter alia, the unconditional responsibility for the payments of all sums due to China Airlines; and for the due performance of this responsibility, it undertook to provide the airline with a bank guarantee. Hence, by a letter of guarantee No 005181 stamped on 27 July 1989, the bank undertook to pay on demand to China Airlines the sum of RM400,000 for the due performance of the covenants under the GSA agreement. We shall deal with this letter of guarantee in greater detail when we discuss the second appeal. For the moment, suffice it to note that the validity period of the said guarantee was from 10 August 1989 to 9 August 1990.

Turning to the incentive bonus scheme, it is to be noted that this scheme, known as 'special bonus on flown incentive quota', was introduced by China Airlines exclusively for its agents. Under this scheme, the agents had to achieve three targets, A, B and C as the minimum net sales valued in US dollars. If the targets were achieved within a given year, the agents would be entitled to receive a certain percentage, ranging between 2.5% and 7% as bonus over and above any other commission due and payable to the agents by China Airlines. The bonus earned in any calendar year was, however, payable in the month of March of the following year. Accordingly, the parties hereto executed three agreements — AB22, AB26

and AB29 for the years 1987, 1988 and 1989 — providing for the agent's entitlement to the incentive bonus. There was no written agreement for 1986. It is common ground that the three agreements did not specify the areas of the agent's entitlement, ie whether for Kuala Lumpur sales or for the whole of Peninsular Malaysia. It is also significant to note that the targets to be achieved by the agent differed from year to year.

With regard to the second appeal, the following facts were not disputed. As a result of the agent's failure to settle the accumulated amount for tickets purchased from China Airlines, the latter terminated the GSA agreement, AB2–15. The amount due and owing by the agent to the airline as at the first half of July 1989 was RM1,503,115.58 (AB40). Despite promises to pay, the agent did nothing to reduce its indebtedness. By a letter dated 8 September 1989, China Airlines solicitors gave the agent 48 hours to pay up, failing which they would treat the GSA agreement as being terminated and legal action would follow. The termination was confirmed by the same solicitors in their letter dated 11 September 1989. On 13 September 1989, the solicitors wrote to the bank informing them of the amount owed by the agent and requested for the said sum under the letter of guarantee to be paid to them as solicitors for China Airlines. Accordingly, on 17 November 1989, the bank paid out the sum of RM400,000 under the guarantee to China Airlines.

Civil Appeal No 02–747–1993 (China Airlines' Appeal)

There are two grounds of appeal. The first ground can be disposed of quite easily. It was submitted that the learned judge erred in deciding on the issue of quantum when the parties to the action had agreed to reserve their examinations on the agent's loss of income until after the question of liability was decided. From the notes of proceedings, at p 129 of the appeal record A–B, the learned judge recorded as follows:

> Both counsel for the first and second defendants reserve their rights to cross-examine PW1 on the issue of loss of income as parties have agreed that only evidence as to liability will be proceeded with at this juncture.

It seems clear from the foregoing and the postponement of the submission of counsel on the loss of income the learned judge, on her own volition, proceeded to assess the damage, ie the claim for incentive bonus. In her judgment (reported in [1994] 1 AMR 2:55 at p 72), the learned judge found as follows:

> Having decided that the plaintiff is also entitled to incentive bonus on AB2–15 from 1986 until its termination, I now consider the amount that is payable to the plaintiff. In this respect, I rely on AB76–77 which are agreed documents, that shows the calculation of the incentive bonus after due credit is given to AB27, the only incentive bonus given by the first defendant to the plaintiff in 1988 in respect of sales conducted in 1987. To that end, the plaintiff succeeds in its claim for the sum of RM1,676,097.49 as the incentive bonus due for the period 1986–1989.

In the light of the printed evidence, we have no difficulty in coming to our conclusion that the learned judge was wrong to make the assessment of the loss of income without hearing the parties, especially when the argument on quantum — as opposed to liability — was postponed until after the conclusion of the taking of evidence on liability. We hasten to add that this could only be due to an oversight.

The second ground, which is more substantive, concerned the payment of incentive bonus to the agent. It was the appellant's case here and in the court below that the agent was not entitled to be paid the incentive bonus for the year 1986, and secondly, the said incentive bonus scheme only applied to sales of tickets by the agent as a PSA and not as a GSA.

On the first issue, the learned judge found that the agent was entitled to be paid the incentive bonus for the year 1986. Her findings are as follows ([1994] 1 AMR 2:55 at p 70):

> Coming now to the plaintiff's claim for incentive bonus, the first issue raised is when was the plaintiff entitled to such a scheme, for although the first defendant introduced it on 1 January 1986 to increase its business and boost its sales, nonetheless it claims that the scheme was only available to the plaintiff in 1987 as seen from AB27, a credit note stating the amount of incentive bonus due to the plaintiff in 1987. The first defendant also contends that the scheme is only confined to sales conducted in Kuala Lumpur as only a PSA is entitled to an incentive bonus but not the GSA and to that extent, AB22, 26 and 29 relate to sales in Kuala Lumpur only but not to sales in areas where the plaintiff was the GSA.
>
> Despite the first defendant vehemently trying to insist that the plaintiff was only entitled to incentive bonus in 1987, the most telling evidence came from the first defendant's former employee, PW3, and its sales manager, DW3. PW3's evidence is that as the Passenger Sales Supervisor of the first defendant, he had prepared AG126, a list containing the names of 25 agents to whom the first defendant granted incentive bonus. The plaintiff topped this list and unlike the agents listed as Nos 17, 19, 20 and 25 who were given incentive bonus in 1987, the plaintiff enjoyed the benefit in 1986. When cross-examined, DW3 admitted that the plaintiff may well have enjoyed the benefit since 1986. In any event, since the introduction of the scheme was to increase the first defendant's business, it does not stand to reason why the plaintiff, who supported the first defendant, was only allowed to enjoy the benefit a year after the other agents did. In this respect, there is again PW3's unchallenged testimony that the agents who enjoyed the incentive bonus in 1987, were those who supported other airlines. To that end, I hold that the plaintiff is entitled to incentive bonus since 1 January 1986.

With respect to the agent's entitlement to enjoy the incentive bonus both as a PSA and GSA, the learned judge gave the following reasons (at p 71):

> As for the first defendant's contention that the scheme was only applicable to PSA and not to a GSA, AB22, 26 and 29, the three incentive bonus agreements for 1987–1989 executed by the plaintiff with the first defendant do not specify the areas nor the type of agent to whom such a scheme was

operative. Except for the difference in the amounts of the targets to be achieved, all the three agreements identify the plaintiff as the agent to benefit from such a scheme, the authority who shall calculate the payments, the documents to be submitted for consideration, the need for secrecy from outsiders, the restriction that the plaintiff should not form a consortium with other agents to achieve their targets and the right given to the first defendant to withdraw or withhold payment on proof that the plaintiff had violated the agreements. All the three agreements are the first defendant's own documents and if indeed the agreements are ambiguous as the first defendant contends, then it should have been more explicit when expressing its intentions to paper and on the face of the three agreements, I consider that the plaintiff is to enjoy the incentive bonus for so long as the targets are achieved as a PSA as well as a GSA.

Relevant principles of law

In the light of the above findings of the learned judge, a fundamental question of principle arises — which is, whether in the circumstances of the case, this court can interfere with the findings of fact of the court below. It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (*Crofter Hand Woven Harris Tweed Co Ltd & Ors v Veitch & Anor* [1942] 1 All ER 142 (HL) per Lord Porter at p 167). However, the authority for the above proposition is the speech of Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582, particularly the following passage (at p 587):

> I Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

On the other hand, there is a clear authority also from the House of Lords — and followed by the Privy Council — which says that a distinction can

be drawn between a finding of a specific fact which depends upon the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former. That authority is the speech of Lord Reid in the House of Lords' decision in *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326, followed later by the Privy Council in the Singapore case of *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 87 at p 94. At p 329, his Lordship stated:

> *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. *But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion.* (Emphasis added.)

In *Tay Kheng Hong v Heap Moh Steamship Co Ltd*, the Singapore Court of Appeal found there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondents' case. It held that the trial judge was wrong in accepting the appellant's evidence. On appeal, the Privy Council held that the Court of Appeal's acceptance of the witness's evidence depended on inferences from documents. However, these inferences were insufficient material to entitle them to reject the result arrived at by the trial judge.

In the present case, it is apparent to us that the learned judge based her findings after considering the evidence of the witnesses and the documents; and clearly, her conclusions were based on inferences drawn from them. In our view, the learned judge did not make any specific finding of fact based on the evidence of PW3 and DW3 and the documents. Although she accepted the evidence of PW3 and DW3 as the most telling, there was nothing in her judgment which indicated her decision was based on the credibility of the witnesses or as a result of the impression she formed of them. At any rate, we will also show that her acceptance of their evidence was wrong. As for the second issue, her conclusion depended entirely on inferences drawn from the three agreements, AB22, 26 and 29. Since the present case does not involve the question of credibility of the witnesses, we are satisfied, following the *Benmax* principle, that we are in as good a position to review and evaluate the evidence of the case as the trial judge.

Re-evaluation of Evidence

On the first issue, the learned judge relied on the evidence of PW3 and DW3, which she described as the most telling evidence against the airline that the agent was entitled to incentive bonus for 1986. The crux of PW3's evidence was as follows. He testified that he prepared AG126, a list containing the names of 25 travel agents for whom the incentive bonus scheme was proposed. The agent's name was first on the list, which was handwritten. Only one copy was prepared. Under cross-examination, he stated he could not remember when he wrote it. Next, he stated that China Airlines gave incentive bonus to its 25 agents. The agent was one of those given in 1986. Some agents were only given incentive bonus in 1987 because they had earlier supported other airlines. He stated that he had personal knowledge of incentive bonus agreements because they were signed in his presence. It would appear to us that from this evidence the learned judge accepted PW3's evidence as the 'most telling evidence', without considering the fact that he was formerly the passenger sales supervisor of China Airlines, who was dismissed by the airline in 1987 and who had admitted in evidence that he considered the whole episode of his dismissal as painful. Surely, an inference could be drawn that this witness had an axe to grind and had every reason to be hostile to China Airlines and therefore his evidence ought to have been treated with caution. The learned judge should have also noted that AG126 contained names of the travel agents for whom incentive bonus was only proposed. There was also no explanation from PW3 who prepared the handwritten list why there was no written agreement for the payment of bonus for 1986.

With respect to DW3, the learned judge accepted his evidence because he had admitted under cross-examination that the agent might well have enjoyed the benefit since 1986. In our view, the learned judge appeared to have overlooked the earlier part of DW3's evidence when he stated: 'In 1986, there was incentive bonus but the plaintiff (agent) was not given.' Thus, in the light of DW3's answer that the agent might well have enjoyed the bonus since 1986, it was wrong for her to have drawn an inference and to come to the conclusion that the agent was entitled to the incentive bonus for 1986. In our view, the learned judge should have also considered the following contemporaneous evidence relied by China Airlines. It was not disputed that the agent's entitlement for 1987, 1988 and 1989 bonuses were provided for by the three written agreements, AB22, AB26 and AB29. There was no written agreement for 1986. Based on this fact, the proper inference to be drawn was that there was no agreement to pay the agent the 1986 bonus when the agreements for the following three years were in writing. Secondly, if the agent was entitled to the 1986 bonus, why was there no protest or complaint for its non-receipt when the agent received the 1987 bonus of RM21,347.04 ('AB27') in March 1988. Thirdly, it was not disputed that the agent was a temporary GSA for Kuala Lumpur

in 1986 enjoying an overriding commission of 3%. In our view, it would not be commercially prudent nor would it be probable for the airline to pay incentive bonus over and above the 3% GSA commission. Based on the above factors, we are of the opinion that the learned judge had misdirected herself in not considering them upon which the inferences could be drawn that it was more probable that the agent was not entitled to the incentive bonus for 1986.

On the second issue, the learned judge relied on the content of the three incentive bonus agreements — AB22, AB26 and AB29 — in coming to her conclusion that the agent could enjoy the incentive bonus for so long as the sales targets were achieved by the agent as a PSA and a GSA. The learned judge recognized that the agreements did not specify the areas nor the type of agent, ie a PSA or a GSA. Thus, she found, on a true construction of the agreements, that except for the difference in the amounts of the targets to be achieved by the agent, the said agreements had identified the agent as the agent who would benefit from the scheme, the authority who should calculate the payments, the party who would submit the documents for consideration, the need for secrecy etc. From the above facts and coupled with her observation that China Airlines should have been more explicit when expressing their intention in a written document, the learned judge drew the inferences and arrived at her conclusion that the agent was entitled to enjoy the incentive bonus both as a PSA and a GSA.

In our view, there is nothing ambiguous in the three agreements, AB22, AB26 and AB29. In addition, from the evidence in the appeal record, we find the learned judge failed to give sufficient or any consideration to the following contemporaneous matters. First, it was not disputed that up to 1987, the agent was the GSA for Peninsular Malaysia as well as the temporary GSA for Kuala Lumpur. On 31 August 1986, its status as the temporary GSA for Kuala Lumpur expired and was not renewed. The airline then introduced the incentive bonus scheme to the agent to compensate for the loss of its status as the GSA for Kuala Lumpur. In our view, it does stand to reason, and quite logically so, that the incentive bonus scheme was only meant for Kuala Lumpur — as opposed to the whole Peninsular Malaysia — since the intention of the scheme was to compensate the loss of GSA status for Kuala Lumpur only after August 1986.

Secondly, the credit note, AB27, clearly stated that it was the incentive bonus payment in respect of Kuala Lumpur branch sales for the period January–December 1987. Hence, the agent must be aware that this incentive bonus was paid for Kuala Lumpur region only. Again, this fact that the bonus was from January–December 1987 and for the sales in respect of Kuala Lumpur only as compensation for the termination of the agent's appointment as GSA for Kuala Lumpur in 1986 was reiterated in the

airline's letter to the agent dated 22 September 1989. In our view, the absence of any complaint or protest regarding the content of AB27 is inconsistent with the agent's case.

Thirdly, it would be observed that the sales targets to be achieved by the agent differed for the three years. In AB22, the minimum net sales for target A was US$200,000 at 2.5% bonus, for target B US$200,000–US$340,000 at 5% bonus and for target C US$340,000 and above at 7% bonus. In AB26, for target B, the amount was raised to US$200,000–US$400,000 and for target C to US$400,000. However, in AB29, the sales for target A was reduced to US$160,000 and bonus was increased to 3%. For targets B and C, the net sales target was reduced to US$320,000 although the bonus was maintained at 5% and 7% respectively. If the incentive bonus scheme was payable for the whole of Peninsular Malaysia including Kuala Lumpur, where the airline's ticket sales would be invariably bigger, then it would be more probable for the sale targets set for the agent to achieve for the three years to be on an escalating scale, instead of reducing the target from US$400,000 to US$320,000 for 1989 as in AB29.

Fourthly, despite the admission of its indebtedness to China Airlines and its offers to pay outstanding debts by instalments, it seems to us that it did not occur to the agent to suggest to the airline that it was entitled to set off any payment due to it under the incentive scheme. It only dawned on the agent to claim for the incentive scheme bonus as a PSA as well as GSA after it received the notice of termination of the GSA agreement from China Airlines' solicitors dated 11 September 1989. Thus, it was only on 21 September 1989 that it submitted to China Airlines the computation of its claim for the incentive bonus, both as a PSA and a GSA.

In the light of the above matters, in our view, the inescapable inference which could be drawn from the contemporaneous documents and the conduct of the parties gathered from the letters referred to above was that there was no question of the agent being entitled to the incentive bonus both as a PSA and a GSA. In arriving at our conclusions, we have no doubt differed from the learned judge. However, since the credibility of the agent's witnesses is not the main issue, we are justified in coming to a different conclusion because upon a review of the evidence as a whole, we find the learned judge had misdirected herself in failing to give due considerations to the contemporaneous documents in assessing the probabilities of the case. Had she done so, the balance would tilt in favour of the appellant, China Airlines.

In the result, we would allow this appeal with costs here and below. The judgment of the court below dated 7 December 1993 ordering China Airlines to pay the agent RM1,679,097.49 with interest at the rate of 8% pa from 11 September 1989 onwards is hereby set aside.

Civil Appeal No 02–5–1994 (Agent's Appeal)

In this appeal, the agent challenged the correctness of the learned judge's decision on two grounds. The first ground related to the termination of the GSA agreement. It was the contention of learned counsel that whilst appreciating that art XV(2) and (3) form part and parcel of the GSA agreement, the learned judge, however, erred in failing to hold that the reason given by China Airlines in its letter of termination did not fall within art XV(3) of the agreement. In short, it was submitted that there was no basis for China Airlines to terminate the agreement because the agent was never in the state of insolvency.

Article XV(3) states:

> Notwithstanding the provisions of para 2 hereabove, either party may terminate this agreement at any time if the other party becomes insolvent, makes a general assignment for benefit of creditors, or commits an act of bankruptcy, or if a petition in bankruptcy or for its reorganization or readjustment of its indebtedness be filed by or against it, or if a receiver, trustee, or liquidator of all or substantially all of its property be appointed or applied for.

In view of art XV(3) above, China Airlines wrote to the agent on 8 September 1989 terminating the GSA agreement; the material paragraph of the letter states as follows:

> Take notice that unless the full sum of $1,503,115.58 is paid to us as Solicitors of our clients or to our clients directly by way of a Bank draft within 48 hours from the date hereof, you will be deem to be unable to settle your debt and thereby in the state of insolvency. In such event, the aforesaid General Sale Agencies Agreement is deemed to be terminated and this letter is also served as a notice for such termination and legal action will also be taken against you to recover whatsoever sum due to our clients by you without further notice to you.

The learned judge found ample evidence from the correspondence passing between the parties, including the above-mentioned letter, that the agent had failed to settle the outstanding amount with China Airlines and having found also that the agreement was lawfully terminated, gave judgment against the agent for the sum of RM814,171.14 with interest at 8% pa from 14 June 1990.

In our opinion, the word 'insolvent' as used in the agreement cannot have any technical meaning ascribed to it because it has no such meaning in our Bankruptcy Act 1967, where only the word 'bankrupt' is used. (See s 3(1) of the Act as to the 'Acts of bankruptcy'). Thus, 'insolvent' by popular usage simply means unable to pay debts or if it is to be more formal, it means 'unable to pay one's debts or discharge one's liabilities' (see *The Shorter Oxford English Dictionary*). Therefore, since the agent was unable to pay its outstanding debt — despite the indulgence given by China Airlines and consequent to the 48-hour notice given by the solicitors it still failed to pay the sum demanded — in our view, the agent must be

A deemed to be insolvent. Hence, in our judgment, the GSA agreement, AB2–15, was lawfully terminated. Accordingly, we find no reason to interfere with the judgment of the court below.

The second ground of appeal is substantially against the bank regarding the letter of guarantee AC4 which, in part, provides as follows:

B *Letter Of Guarantee*

> We Perwira Habib Bank Malaysia Bhd, Cawangan Bandar, Tingkat Bawah Wisma Pahlawan, Jalan Sulaiman, 50000 Kuala Lumpur, hereby undertake to pay on demand to Messrs China Airlines Ltd the sum of RM400,000 (Ringgit Malaysia: Four Hundred Thousand Only) as may be required for
C the due performance of the covenants in the contract between you and Messrs Maltran Air Corp Sdn Bhd, 79, 2nd Floor, Jalan Bukit Bintang, 55100 Kuala Lumpur. The said sum shall become payable by us in the event of the said Messrs Maltran Air Corp Sdn Bhd's failure to perform the said covenants.

D The complaint of Encik Chandran was that the learned judge had failed to appreciate that AC4 was a conditional guarantee, where by the express terms that: 'The said sum shall become payable by us in the event of the said Messrs Maltran Air Corp Sdn Bhd's failure to perform the said covenants.'

The bank was required to ensure that the agent had failed to perform
E the covenants under the agreement before paying out the said sum under the guarantee. It was submitted that the obligation was on the bank to have enquired to see if the agent had in fact breached the GSA agreement warranting the payment of RM400,000 under the guarantee. If there had been this enquiry, the bank would have discovered of the fact of the
F payment of RM1.6m due to the agent under the judgment of the court and therefore would have negated the allegation of any money due and payable by the agent to China Airlines and thereby negated any case for payment under the guarantee.

Encik Nantha Balan, for the bank, submitted that AC4 was an unconditional 'on demand' type of guarantee where liability to pay arose
G immediately upon a demand being made on the bank by China Airlines, who was the beneficiary under the guarantee. It was submitted that the words 'The said sum shall become payable by us in the event of the said Messrs Maltran Air Corp Sdn Bhd's failure to perform the said covenants' did not demolish the unconditional on demand nature of the guarantee.
H They merely referred to the circumstance in which the beneficiary would be entitled to make a demand.

Alternatively, he submitted that if AC4 was a conditional guarantee, then the liability to pay would arise upon presentation of the appropriate documents asserting the existence of facts which would trigger off such
I liability. In this regard, counsel submitted that China Airlines in its letter of demand clearly had asserted that the agent was in breach of the covenant to pay under art VII of the GSA agreement. Counsel relied on *Esal*

(Commodities) Ltd & Anor v Oriental Credit Ltd & Anor [1985] Lloyd's Rep 546, where the English Court of Appeal at p 550 accepted the proposition that in a conditional guarantee — in addition to the beneficiary under the guarantee making the demand — he must also inform the bank that he does so on the basis provided for in the performance bond itself.

A bank guarantee is a performance bond. There are two types of performance bond. The first type is a conditional bond whereby the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default. The second type is an unconditional or 'on demand' performance bond which is so drafted that the guarantor will become liable merely when demand is made upon him by the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the principal contract. According to the learned authors of *The Modern Contract of Guarantee* (2nd Ed) at p 664, the tendency of the English courts (since, according to the authors, that the Australian courts have not yet been faced with the same problems of construction) has been to treat the performance bonds as unconditional if there was a clear statement that the amount guaranteed was payable by the bank simply upon a written demand being made, even though there might be some indications to the contrary elsewhere in the document. The learned authors cited *Esal (Commodities) Ltd*'s case, where the bank 'undertook to pay the said amount on your written demand *in the event that the supplier fails to execute the contract in perfect performance*' (emphasis added), it was held that the latter words did not alter the fact that the money was payable upon a written demand being made as stated in the earlier part of the clause. The beneficiary of the bond did not have to show a failure to perform by the supplier in order to claim upon the bond.

Esal is also an example of contractual interpretation of the words in a performance bond — the interpretation aspect of it was emphasized in the (then) Supreme Court case of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149.

In *IE Contractors Ltd v Lloyd's Bank plc and Rafidian Bank* [1990] 2 Lloyd's Rep 296, Staughton LJ was of the view that in cases of ambiguity, there was 'a bias or presumption' that performance bonds were not payable upon proof of facts, but merely upon the presentation of the appropriate documents (that is, in the case of unconditional bonds upon the making of a written demand).

Returning to *Esal (Commodities) Ltd*, a case which we will place reliance on, the material words of the undertaking in the performance bond read: 'We undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance.'

OCL, the appellant, contended that liability under the performance bond was conditional and that the condition had not been complied with. Mr Tugendhat, counsel for OCL, relied on the words in the undertaking immediately following 'written demand': 'in the event that the supplier fails to execute the contract in perfect performance.'

OCL contended that on the true construction of the performance bond, either: (a) there was no liability under the performance bond unless and until there had been a breach of the underlying contract of sale, and this was never established; alternatively, (b) that the beneficiary of the performance bond not only had to make a written demand for payment under and pursuant to the performance bond, but he must in the making of the demand assert that the demand was made because the supplier had failed properly to execute the contract.

Ackner LJ (as he then was), delivering the judgment of the Court of Appeal, stated (at pp 549–550) as follows:

> As regards the first interpretation, Mr Tugendhat is obliged to accept that if he is right, the bank, by entering into the performance bond is taking upon itself the obligation of deciding the merits of a dispute under a contract of sale, a function for which it is virtually common ground the bank is wholly unfitted and which the parties could not sensibly have intended. As Mr Sumption for WF correctly submitted, if the performance bond was so conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a competent court of jurisdiction and this result would be wholly inconsistent with the entire object of the transaction, namely to enable the beneficiary to obtain prompt and certain payment. There is no need to cite, at any length, the well-known case of *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 QB 159 as to the general nature of a performance bond, where it is stressed that a bank is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not, the only exception being where there is clear evidence both of fraud and of the bank's knowledge of that fraud.

His Lordship added:

> However, I accept Mr Tugendhat's alternative submission that in addition to the beneficiary making the demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself. This interpretation not only gives meaning and effect to the words 'in the event that the supplier fails ...' which otherwise would be mere surplusage, but it in no way imposes an extravagant demand upon the bank. A beneficiary may seek, honestly or dishonestly, to apply a performance bond to the wrong contract, and the need to inform the bank of the true basis upon which he is making his demand may be very salutary. Moreover, the desire for an extension of the performance bond may, on occasions, be due to the fact that the performance, for one reason or another, might have been

> justifiably delayed and the beneficiary does not yet know whether or not there will in due course be full compliance with the contract. The requirement that he must, when making his demand for payment in order to support his request for an extension, also commit himself to claiming that the contract has not been complied with, may prevent some of the many abuses of the performance bond procedure that undoubtedly occur. (See the observation of Kerr J (as he then was) in *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] 1 QB 146 at p 150.

In her grounds of judgment, the learned judge recognized that AC4 is an 'on demand guarantee'. However, she held that because of the qualifying words in the latter part of the guarantee to the effect that the sum would become payable in the event of the agent's failure to perform the said covenants, the bank was only obliged to pay if it was satisfied that the agent had defaulted in its obligations under the GSA agreement. On that premise, the learned judge proceeded to consider China Airlines' letter of demand to the bank and other documents to find out if the qualifying words under the guarantee had been fulfilled. In the result, she found as follows (at p 75):

> AC12–13 is the formal demand stipulated for under the guarantee and it enclosed again AB40, AB47, AB48 and AB44, the plaintiff's letter addressed to the first defendant admitting the amount due and proposing payment by instalments. It is pursuant to AC12–13 that the second defendant made the payment and the question to be asked here is whether such payment out has been lawfully made under AC4. I reply that in the affirmative, as all that is required of the second defendant is to satisfy itself that the demand is made bona fide and faced with the contemporaneous correspondence of the first defendant and the plaintiff's unqualified written admission of the amount due, I consider that the payment out of the RM400,000 under the guarantee has been lawfully done. To that end, the plaintiff's claim against the second defendant to be indemnified for the RM400,000 paid out by the second defendant under the guarantee must fail.

From the above conclusion of the learned judge, we form the view that she has construed AC4 as a conditional guarantee, although recognizing that it is an 'on demand' guarantee. However, in arriving at her conclusion that the payment out of the sum of RM400,000 under the said guarantee was lawfully made, we find that she had applied the same approach as in *Esal*, where Ackner LJ accepted the alternative submission of counsel for OCL that in addition to the beneficiary of the performance bond making the demand, he must also inform the bank that he does so on the basis provided for in the performance bond itself. Needless to say, in the circumstances of the present case, we consider this to be the correct approach. Here, to comply with the terms of the said guarantee, the solicitors' letter to the bank dated 14 November 1989 specifically demanded payment of RM400,000 under the said guarantee giving the reason that the agent had failed to perform its part of the covenants under the GSA agreement. In addition to making this demand, the letter asserted that it

was so made because under art VII of the agreement, the agent had the unconditional responsibility for the due payment to the airline of money in respect of tickets sold which it had continuously failed to settle. The solicitors also enclosed in the demand letter the correspondence exchanged by the parties. In our view, the reference to the breach under art VII of the GSA agreement in the letter of demand does give meaning and effect to the qualifying words in the guarantee, ie in the event of the agent's failure to perform the covenants in the agreement. Thus, on the above grounds, we are satisfied — as was the learned judge — that the qualifying words in the latter part of the guarantee have been fulfilled.

In the result, we agree with the reasons and conclusion of the learned judge that the payment out of the sum of RM400,000 under the said letter of guarantee had been lawfully made.

Accordingly, we dismiss this appeal with costs.

Order accordingly.

Reported by Ringo KL Low